Supreme Court, U.S.
FILED

SEP 9 2002

OFFICE OF THE CLERK

No. 01-1572

IN THE

Supreme Court of the United States

COOK COUNTY, ILLINOIS

Petitioner,

v.

UNITED STATES *ex rel.* JANET CHANDLER, PH.D.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF PUBLIC HOSPITALS AND HEALTH SYSTEMS, CONTRA COSTA REGIONAL MEDICAL CENTER, GRADY HEALTH SYSTEM, HALIFAX HOSPITAL MEDICAL CENTER, HARBORVIEW MEDICAL CENTER, HURLEY MEDICAL CENTER, THE HEALTH AND HOSPITALS CORPORTATION OF MARION COUNTY, JACKSON MEMORIAL HEALTH SYSTEM, MEMORIAL HEALTHCARE SYSTEM, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, PARKLAND HEALTH AND HOSPITAL SYSTEM, RIVERSIDE COUNTY REGIONAL MEDICAL CENTER AND SANTA CLARA VALLEY HEALTH & HOSPITAL SYSTEM IN SUPPORT OF PETITIONER

Charles Luband, *Counsel of Record*
Larry S. Gage
Hemi D. Tewarson
POWELL, GOLDSTEIN,
FRAZER & MURPHY LLP
1001 Pennsylvania Ave., NW, Suite 600
Washington, D.C. 20004
(202) 347-0066

Attorneys for Amici Curiae

September 9, 2002

TABLE OF CONTENTS

TABLE OF CONTENTS i
BRIEF *AMICI CURIAE* 1
INTERESTS OF THE *AMICI CURIAE* 1
SUMMARY OF THE ARGUMENT 4
ARGUMENT 6
I. The FCA Is Not Applicable to Local Public Hospitals Because There Is No Clear Congressional Intent That the FCA or Its Punitive Damages Regime Be Applied to Local Governments 6
A. Punitive Damages May Not Be Applied to Local Governments 6
B. Congress' Failure to Act Requires Immunity for Local Governments From Liability Under the FCA 9
1. Local governments are not "persons" under the FCA 10
2. Absence of congressional intent precludes the application of punitive damages under the FCA upon local governments 12
II. Local Governments Are Immune From the FCA Because the Imposition of Punitive Damages Would Harm the Public at Large and More Particularly Vulnerable Patient Populations and Taxpayers 17
A. Public Policy Considerations Preclude the Imposition of the FCA's Punitive Damages Upon Local Governments 17
B. Imposition of Punitive Damages Upon Local Public Hospitals Will Truly Punish Vulnerable Patient Populations and Taxpayers 21
CONCLUSION 25

TABLE OF AUTHORITIES

CASES

City of Newport, et al. v. Fact Concepts, Inc., 453 U.S. 247 (1981) ..... *passim*
Doe v. County of Centre, 242 F.3d 437 (3d Cir. 2001) 8
Ferguson v. Joliet Mass Transit Dist., 526 F.Supp. 222 (N.D. Ill. 1981) 8
Genty v. Resolution Trust Company, 937 F.2d 899 (3d Cir. 1991) 9
McLaughin v. Rose Tree Media School District, 1 F.Supp.2d 476, 483 (E.D. Pa. 1998) 8
Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978) 11, 12
Pacific Mutual Life Insur. Co. v. Haslip, et al., 499 U.S. 1 (1991) 20
Pierce v. Underwood, 487 U.S. 552 (1988) 15
Pierson v. Ray, 386 U.S. 547 (1967) 7, 13
Raie v. City of Philadelphia, 2001 WL 884707 (E.D. Pa. 2001) 8
Schultzen v. Woodbury Cent. Cmty. Sch. Dist., 187 F.Supp.2d 1099 (N.D. Iowa 2002) 7, 8
Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 13
United States ex rel. Chandler v. Cook County, Ill., 277 F.3d 969 (7th Cir. 2002) ..... *passim*
United States ex rel. Dunleavy v. County of Delaware, et al., 279 F.3d 219, 225 (3d Cir. 2002) 12, 13, 16
United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486 (5th Cir. 2001) ..... *passim*
United States ex rel. Graber v. the City of New York, 8 F. Supp.2d 343 (S.D.N.Y. 1998) 15
United States ex rel. Honeywell v. San Francisco Housing Auth., et al., 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. Jul. 12, 2001) 16

United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl., 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001) 16
United States ex rel. Kinney v. Hennepin County Med. Ctr., 2001 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001) 16
United States ex rel. R&R Ltd. P'ship v. Mass. Hsg. Fin. Agency, 154 F. Supp. 2d 19 (D.D.C. 2001) 16
United States ex rel. Rosales v. San Francisco Hsg. Auth., 173 F. Supp. 2d 987 (N.D. Cal. 2001) 16
United States ex rel. Satalich v. City of Los Angeles, 160 F. Supp.2d 1092 (C.D. Cal. 2001) 16
United States ex. rel. Giles v. Sardie, 191 F.Supp.2d 1117 (C.D. Cal. 2000) 16
United States v. McNinch, 356 U.S. 595 (1958) 10
Vermont Agency of Nat. Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) ..... *passim*
Wallace v. Christensen, 802 F.2d 1539 (9th Cir. 1986) 15
Weinberger v. Rossi, 456 U.S. 25 (1982) 15
Wright v. West, 505 U.S. 277 (1992) 15

STATUTES

18 U.S.C. §§ 1961-1968 9
20 U.S.C. §§ 1681-1688 8
29 U.S.C. § 794 8
31 U.S.C. §§ 3729-3731 ..... 2, 9, 14, 21
42 U.S.C. §§ 12131-12165 8
42 U.S.C. § 1981 8
42 U.S.C. § 1983 ..... 11, 12
42 U.S.C. § 2000e 8
Act of Mar. 2, 1863, ch. 67 §§ 1, 3, 12 Stat. 696 10
Pub. L. No. 99-562, 100 Stat. 3153 (1986) 13

OTHER AUTHORITIES

Sup. Ct. R. 37.2(a) 1
Sup. Ct. R. 37.6 1

RULES

Nat'l Ass'n of Pub. Hosp. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2000* (2002) ..... *passim*
Nat'l Ass'n of Pub. Hosp. & Health Sys., *The Safety Net*, Vol. 15, n.2, 1, 26 (Spring 2002) 24
Nat'l Ass'n of Pub. Hosp. & Health Sys., *What Are the Basic Components of a Sound Hospital Emergency Preparedness Program?* (2000) 23
S.Rep. No. 99-562 (1986) 15

BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(a) of the Rules of this Court on written consent of all parties filed with the Clerk of this Court concurrently with this brief, the National Association of Public Hospitals and Health Systems ("NAPH"), Contra Costa Regional Medical Center, Grady Health System, Halifax Hospital Medical Center, Harborview Medical Center, Hurley Medical Center, Health and Hospital Corporation of Marion County, Jackson Memorial Health System, Memorial Health Care System, New York City Health and Hospitals Corporation, Parkland Health and Hospital System, Riverside County Regional Medical Center and Santa Clara Valley Health & Hospital System, respectfully submit this brief *amici curiae* in support of Petitioner on writ of certiorari to the United States Court of Appeals for the Seventh Circuit [hereinafter "the Seventh Circuit"].[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae consist of NAPH, a national association of safety net hospitals and health systems, and twelve of its members, all of which are owned or operated by local governments (*i.e.*, county or city hospital authority, hospital district or public benefit corporation). NAPH represents over 100 providers that deliver safety net health care services, predominantly in large metropolitan areas. A substantial majority of NAPH members are owned or operated by state or local governments, or have significant long-standing ties to governmental entities. Thus, NAPH

---

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no person or entity other than *amici*, their members, or their counsel have made any monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

and its members have a significant interest in whether the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3731 may be applied to local governmental entities.

Public hospitals and health systems that are owned or operated by local governmental entities (hereinafter "local public hospitals") fill a critically important role in our society. These providers render a disproportionate share of inpatient and outpatient medical care in their communities to low income patients and otherwise vulnerable populations. These populations typically include persons who are Medicaid-eligible or without health insurance, many of whom suffer from chronic diseases such as AIDS, asthma, tuberculosis and diabetes. In carrying out their public mission, these providers serve as the primary safety net health care facilities in their communities.

To a large extent, most other hospitals generally are unable or unwilling to guarantee access to care for all, regardless of ability to pay, in the same manner as local public hospitals. Market forces and the realities of health care economics simply do not permit most other hospitals to provide significant amounts of care that is not reimbursed by public or private insurers (sometimes called "uncompensated care"). Therefore, local public hospitals fill this void, providing a public good – guaranteed access to care – that the free market does not support. In illustration, just 78 NAPH members provided over 20 percent of all of the uncompensated care across the United States in 2000, averaging 24 percent versus six percent of total costs for the rest of the industry. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *America's Safety Net Hospitals and Health Systems, 2000* (2002) at vi [hereinafter *America's Safety Net*].

Local public hospitals also play a vital role in serving their communities at large, not just the poor and uninsured. They provide high-level specialty services such as emergency and trauma care, burn care, emergency psychiatric care and neonatal intensive care to their

surrounding communities – uninsured and insured alike. These specialty services are provided as part of the local public hospital's mission, despite their high cost and extremely low reimbursement rates. *Id.* at 6. Local public hospitals also are an integral part of this nation's front line response to emergencies, natural disasters, major industrial epidemics and acts of bioterrorism. As other health care providers do not generally have all of these capabilities, local public hospitals must fill a unique niche in our communities.

Given their public mission, local public hospitals are dependent on funding from federal, state and local governments. NAPH member data indicates that on average, they provide over 80 percent of services to Medicare, Medicaid or uninsured patients. *Id.* at 2. NAPH members also rely on federal, state and local governments for approximately 75 percent of their gross patient revenues. *Id.* at 3.

One clear consequence of receiving this funding from federal, state and local governments is that local public hospitals are subject to a myriad of federal, state and local laws governing submission of claims for reimbursement and related issues, leading to the question at hand - whether local public hospitals are subject to liability for punitive damages under the FCA. If local public hospitals are found liable under the FCA, punitive damages would threaten their ability to render essential, yet underreimbursed, health care services in their communities.

Therefore, *amici* have a significant interest in the Court's consideration of the decision below, *United States ex rel. Chandler v. Cook County, Ill.*, 277 F.3d 969 (7th Cir. 2002), *cert. granted*, 122 S. Ct. 2657 (2002), that a local public hospital is subject to liability under the FCA.

SUMMARY OF THE ARGUMENT

Amici submit that in the decision below, *Chandler*, 277 F.3d 969, the lower court erroneously held that local governmental agencies are subject to liability under the FCA. This decision squarely conflicts with previous opinions of this Court, as well as decisions rendered by other circuit courts of appeal and district courts, that preclude the application of the FCA's punitive damages to local governmental entities. Accordingly, *amici* agree with the arguments advanced by the Petitioner and respectfully request that this Court reverse the Seventh Circuit's decision.

Local governmental entities have been the subject of a long-established common law presumption of immunity from punitive damages. This immunity applies unless there is express statutory authority to rebut such presumption. *See City of Newport*, 453 U.S. 247. The application of this immunity, however, must also be compatible with the purpose of the statute in question and general principles of public policy. *Id.*

The presumption of immunity for local governmental entities applies to the FCA because there is no clear evidence that Congress intended to abrogate this presumption within the statutory language or the legislative history of the FCA. At the time of the FCA's enactment in 1863, Congress did not presume to include local governmental entities within the purview of the FCA. The FCA remained largely unchanged until its amendment in 1986, when Congress altered the nature of the FCA's damages regime from remedial to punitive. Although Congress was on notice that municipal immunity would be assumed if Congress did not speak clearly, Congress provided no amendment that expressly abrogates state or local governmental immunity from punitive damages. Thus, the language and legislative history of the FCA provides no

basis upon which to rebut the presumption that local governmental entities are immune from its punitive damages.

Public policy considerations also require immunity from punitive damages for local governmental entities. Imposing punitive damages upon a local governmental entity results in either an increased tax burden or a diminution of services for the individuals served by this entity. The application of the FCA to local governmental entities is particularly unwarranted because liability under the FCA mandates the imposition of punitive damages, without any alternative. Moreover, an FCA action may be prosecuted by a private relator on behalf of the United States even when the United States has declined to intervene. A private relator, if successful, may reap a windfall at the expense of the public.

Amici file this brief to emphasize the nature of one class of local government services – safety net health care services provided by local public hospitals – that are at risk as a result of the decision below. In the circumstance of local public hospitals, punitive damages may cause irreparable harm in the form of significantly reduced access to care for community members, often the poor and uninsured, who routinely turn to these facilities when they are sick or injured. Application of punitive damages in this and similar cases imposes a hardship upon communities at large that far outweighs any deterrent effect. Such public policy considerations require the application of immunity to local public hospitals from the FCA's punitive damages.

For these reasons, *amici* respectfully request that this Court reverse the decision of the Seventh Circuit.

ARGUMENT

I. The FCA Is Not Applicable to Local Public Hospitals Because There Is No Clear Congressional Intent That the FCA or Its Punitive Damages Regime Be Applied to Local Governments

In *City of Newport,* 453 U.S. 247, the Court held that local governmental entities are entitled to immunity from punitive damages pursuant to a longstanding common law presumption. Absent express clear congressional intent, such immunity applies to local governmental entities unless "public policy considerations dictate a contrary result." *Id.* at 266.

Congress has been well aware of the common law presumption against the application of punitive damages upon local governments from the time of the enactment of the FCA in 1863 to the present.[2] Despite this knowledge, there is no evidence of any congressional intent to rebut this presumption within the FCA or its legislative history. Accordingly, this Court's application of the historical presumption against the imposition of punitive damages upon local governments, as well as its understanding of the public policy interest served by this immunity, leads inevitably to the conclusion that local governmental entities such as local public hospitals should be exempt from liability for punitive damages under the FCA.

A. Punitive Damages May Not Be Applied to Local Governments

In *City of Newport*, the Court explores the history of judicial application of punitive damages in the mid-1800s –

---

[2] The local governmental immunity presumption is applicable to the FCA because this Court has established that the FCA is a punitive statute. *See Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

a time contemporaneous to the period in which the FCA was first enacted – and concludes that "the courts that had considered the issue prior to 1871 were virtually unanimous in denying such damages against a municipal corporation." *Id.* at 260 (citations omitted). "Courts viewed punitive damages as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." *Id.* at 263.

This common law presumption of municipal immunity from punitive damages has remained virtually unchanged since its inception in the mid-1800s. Indeed, the Court has explicitly recognized that this presumption continues to apply to local governments facing punitive damages claims under federal statutes in the present day. *Id.*, at 261, n.21 ("the general rule today is that no punitive damages are allowed [against a local governmental entity] unless expressly authorized by statute"); *see also Pierson v. Ray*, 386 U.S. 547, 555 (1967) (holding that Congress must clearly act to abolish municipal immunity from punitive damages). Indeed, no court of appeals has permitted an award of punitive damages against a local government without finding express statutory authority for such an award. *See Schultzen v. Woodbury Cent. Cmty. Sch. Dist.*, 187 F.Supp.2d 1099, 1127 (N.D. Iowa 2002) (citations omitted).

In order to apply punitive damages to local governmental entities, courts must first determine that Congress has clearly intended to abrogate local governmental immunity within the language of the statute. *City of Newport*, 753 U.S. 247. Second, courts must consider whether the application of local governmental immunity is consistent with the general purpose of the statute and relevant public policy considerations. *Id.* at 266. Without clear evidence to the contrary, municipal immunity from punitive damages must apply.

The Court has recognized that the rationale of *City of Newport* should be applied to federal laws designed to benefit the citizens of the United States, as "we are concerned with imposing punitive damages on taxpayers under any circumstances." *See Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. at 785. Moreover, courts have applied the municipal immunity presumption against punitive damages to claims under a number of different federal statutes. In illustration, municipal immunity has been applied to claims arising under the Civil Rights Act, 42 U.S.C. § 1981. *See, e.g., Ferguson v. Joliet Mass Transit Dist.*, 526 F.Supp. 222 (N.D. Ill. 1981) ("the silence of Congress and the neutrality of the legislative history of section 1981 ... support a conclusion that the immunity of municipal corporations from punitive damages extends to suits under section 1981").

Courts have also extended this municipal immunity to Title II of the American with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, because these statutes "lack any indicia of Congress' intent to override the settled common law immunity of municipalities from punitive damages." *See e.g., Doe v. County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001). Courts have also found the application of punitive damages upon local governments to be inappropriate under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. *See e.g., Raie v. City of Philadelphia*, 2001 WL 884707 (E.D. Pa. 2001); *McLaughin v. Rose Tree Media School District*, 1 F:Supp.2d 476, 483 (E.D. Pa. 1998). Similarly, municipalities have been held to be immune from punitive damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. *See e.g., Schultzen*, 187 F.Supp.2d at 1227.

Municipal immunity has also been extended beyond claims of violations of civil rights laws to other federal

statutes. For example, courts have applied municipal immunity to bar claims against local governmental entities under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968. *See e.g., Genty v. Resolution Trust Company*, 937 F.2d 899, 920 (3d Cir. 1991) (holding that "a civil RICO claim with its mandatory and punitive treble damages provision cannot be maintained against a municipality . . . absent Congress' declaration to the contrary"). The application of municipal immunity to RICO is especially analogous to the FCA because the mandatory punitive regime of both statutes requires the presumption of immunity unless there is clear statutory authority to the contrary.

Thus, the recognition of long-standing municipal immunity by the Court in *City of Newport* has been applied to protect local governments and their taxpaying communities from punitive damages under a number of different federal statutes. Accordingly, this precedent requires the extension of the presumption of municipal immunity to claims arising under the FCA.

B. Congress' Failure to Act Requires Immunity for Local Governments From Liability Under the FCA

As this Court has confirmed that the FCA is a punitive statute, *Stevens*, 529 U.S. at 784, the Court's reasoning in *City of Newport* is applicable to the FCA. Accordingly, local governmental entities are immune from liability under the FCA unless (i) Congress has expressly abrogated this immunity within the language of the FCA and (ii) the application of this immunity contradicts the purpose of the FCA or public policy considerations. *See City of Newport*, 453 U.S. 247.

The FCA imposes civil penalties on "any person" who presents a false claim to the government or conspires to allow a false claim to be submitted. 31 U.S.C. § 3729(a)(1).

However, upon enactment of the FCA, Congress failed to include a definition of "any person" who may be held liable under the FCA. *See Stevens*, 529 U.S. at 783. Moreover, analysis of subsequent amendments of the FCA reveals no evidence that Congress intended to apply the FCA to local governments or eviscerate the common law presumption against the imposition of punitive damages upon local governments.

1. Local governments are not "persons" under the FCA

The FCA was enacted in 1863 with the principal goal of combating massive fraud perpetrated by large private contractors during the Civil War. *Stevens*, 529 U.S. at 781. Specifically, the FCA was targeted at "any person in the land or naval forces of the United States, or in the militia in actual service of the United States. False Claims Act of Mar. 2, 1863, ch. 67 §§ 1, 3, 12 Stat. 696. The enactment of the FCA also followed "a series of sensational congressional investigations into the sale of provisions and munitions to the War Department." *United States v. McNinch*, 356 U.S. 595, 599 (1958). Given this context, Congress could not have intended to apply the FCA local governments because it was likely private entities – not local governments – that sold military goods to the United States during the Civil War. *See United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 244 F.3d 486, 494 (5th Cir. 2001).

In the case below, the Seventh Circuit erroneously concluded that the FCA originally applied to local governments based on an analysis of the legislative history of a subsequently enacted statute and the court's understanding of the historical evolution of the meaning of "person" that occurred several years after the FCA was passed.

The Seventh Circuit begins its consideration of whether local governments were "persons" under the FCA by

concluding that in 1863, when the FCA was adopted, "both private and municipal corporations were presumptively included within the meaning of 'person.'" *Chandler*, 277 F.3d at 974 (citing *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 685-89) (1978)). However, in *Monell*, the Court only addressed the intended meaning of "person" within section 1 of the Civil Rights Act of 1871 by examining its legislative history, in addition to other statutes that took effect years after the FCA was enacted in 1863. Such considerations are irrelevant to understanding Congress' intent to define "person" under the FCA.

For example, the *Monell* Court noted that by 1844, corporations were deemed to be persons. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 687 (1978) (citing *Louisville R. Co. v. Letson*, 2 How. 497, 558 (1844)). However, this presumption was limited to private corporations because Congress only extended the meaning of the term "person" to municipalities in 1871. *Id.* at 688 (citing Act of Feb. 25, 1871 2, 16 Stat. 431)) (emphasis added)("[i]n all acts *hereafter passed*...the word 'person' may extend and be applied to bodies politic and corporate...unless the context shows that such words were intended to be used in a more limited sense"). Thus, such reasoning does not apply to a determination of whether Congress intended the FCA to apply to local governmental entities. Municipalities were included within the term "person" seven years after the FCA was passed. Moreover, the passage of this 1871 legislation illustrates that the intended definition of "person" did not presume to include municipalities prior to 1871.

Thus, the Seventh's Circuit's reliance upon *Monell* does not provide adequate justification for applying the FCA to local governmental entities. *See Stevens*, 529 U.S. at 783, fn. 12. Unlike the legislative history of 42 U.S.C. § 1983 examined in *Monell*, the FCA provides no evidence of congressional intent to include local governments within its reach. Indeed, circumstances that subject local governments

to potential liability under the FCA have only developed in the latter twentieth century – with local governments receiving federal funding or acting as a government contractor. Thus, Congress in the late 1800's could not have imagined such an application. Conversely, civil rights legislation, by its nature, could reasonably have been applied to local governments. Thus, *Monell*'s reasoning provides no insight into the application of the FCA. Instead, a review of the FCA and its legislative history proves that there is no clear evidence that Congress intended local governments to be "persons" subject to liability.

2. Absence of congressional intent precludes the application of punitive damages under the FCA upon local governments

Even if there were some ambiguity as to whether Congress intended local governments to be included within the term "person" when the FCA was enacted in 1863, any such ambiguity is inadequate to overcome the presumption of local governmental immunity from punitive damages. *United States ex rel. Dunleavy v. County of Delaware, et al.*, 279 F.3d 219, 225 (3d Cir. 2002). As evidenced in the Court's interpretation of liability under 42 U.S.C. § 1983 in *Monell* and *Newport*, although local governments may be held liable for violations of a federal statute as a "person," they may not be subject to punitive damages if Congress did not expressly rebut this common law presumption. A review of the FCA and its legislative history of the FCA does not provide any clear evidence of such a rebuttal.

In 1986, Congress made the first significant amendments to the FCA since its enactment in 1863. Congress altered the FCA damages regime from double damages and a $2,000 penalty per false claim to treble damages and a $10,000 penalty per false claim. In making this change, Congress was well aware of the punitive nature of these newly available damages. *See Tex. Indus., Inc. v. Radcliff*

Materials, Inc., 451 U.S. 630, 639 (1981) ("the very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers"). More significantly, the FCA's punitive damages regime reflects a congressional intent to exclude local governments from the purview of the FCA. *Garibaldi*, 244 F.3d at 493.

Despite the Court's reiteration of municipal immunity in *City of Newport* five years before these amendments, Congress gave no clear indication that it anticipated that local governmental entities would be subject to the FCA's new punitive damages regime. Indeed, *City of Newport* and previous precedent gave Congress clear notice that it would be required to speak clearly to rebut the presumption against local governmental immunity from punitive damages. *See e.g., Pierson*, 386 U.S. 547; *City of Newport*, 453 U.S. 247. Nevertheless, Congress declined to include state or local governments within the definition of "any person" subject to liability under the FCA. *See* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986).[3]

The Seventh Circuit, however, heralds the 1986 amendments as further evidence that Congress intended to subject local governments to the FCA. In particular, the court references provisions and interpretive language added by amendments – the Civil Investigative Demand ("CID")

---

[3] The Third Circuit explains:

> We find nothing on the face of the relevant portions of the FCA as originally enacted in 1863 or in its current form which evidences a clear indication on the part of Congress to subject local governments to punitive damages under the Act. The Act is utterly devoid of any specific intention to subject local governments to its strictures. This lack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Dunleavy, 279 F.3d at 224.

provision, a whistleblower statute and related committee reports. *Chandler*, 277 F.3d 969. But careful examination of these provisions and reports reveals no conclusive evidence of express congressional intent to impose the FCA's punitive damages upon local governmental entities.

The CID provision allows the Attorney General to issue a CID to "any person" with information relevant to the alleged false claim. 31 U.S.C. § 3733(a)(1) This provision defines "person" to include "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." *Id.* at § 3733(k)(1)(4). However, because this definition of "person" is "for purposes of [section 3733]" only, Congress did not intend to apply this definition to 31 U.S.C. § 3729(a) Indeed, this Court has determined that the presence of a reference to States within the definition of "person" in the CID provision and the absence of such a clear reference in section 3729 demonstrate that Congress did not expressly intend to subject States to liability under the FCA. *Stevens*, 529 U.S. at 784. In applying this same analysis to local governments, the CID provision does not provide any evidence that Congress intended to subject local governments to punitive damages under the FCA.

In adding a whistleblower provision, Congress sought to provide protection to private relators and their witnesses. *See* 31 U.S.C. § 3730(h). Although this provision does not include a definition of "person," the Seventh Circuit cites a related committee report that defines employers subject to the whistleblower provision to "include public as well as private sector entities" as evidence that Congress intended local governments to be subject to punitive damages under the FCA. *See Chandler*, 277 F.3d at 975 (citing S. Rep. 99-345 at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273).

This committee report only provides insight on a statutory provision separate and apart from section 3729(a)

of the FCA. Moreover, the report does not provide adequate evidence of congressional intent to impose the FCA's punitive damages upon local governments. *See Pierce v. Underwood*, 487 U.S. 552, 566 (1988) ("it is the function of the courts and not the legislature, much less a committee of one house of the legislature, to say what an enacted statute means"), *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (*en banc*) (Kozinski J., concurring) ("committee reports that contradict statutory language or purport to explicate the meaning of applicability of particular statutory language can short circuit the legislative process, leading to results never approved by Congress or the President"). Thus, this congressional commentary cannot meet the test established in *City of Newport* of express abrogation of local governmental immunity from punitive damages.

In determining that punitive damages should apply to local governments under the FCA, the Seventh Circuit also relies upon a committee report that states that in the FCA "the term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." S.Rep. No. 99-562 at 8 (1986). This report, however, was attempting to interpret the application of the FCA at the time of its enactment. *See United States ex rel. Graber v. the City of New York*, 8 F. Supp.2d 343, 353 (S.D.N.Y. 1998). As post-enactment legislative history, this report cannot serve as a substitute for clear statutory language. *See id.* ("as a mere expression of one legislative chamber's view as to how the phrase should be interpreted, the passage in the report would be granted minimal, if any, weight in determining the meaning of [the FCA]"); *Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *Weinberger v. Rossi*, 456 U.S. 25 (1982) ("Post hoc statements of a congressional committee are not entitled to much weight").

Moreover, the Court has discredited this report, finding that the committee had an incorrect understanding of the meaning of the term "person" enacted some 123 years earlier. *Stevens*, 529 U.S. at 783, n.12. Thus, this report "cannot pass muster in light of the *Stevens* Court's express rejection of the pertinent 1986 legislative history as erroneous and of questionable value." *Dunleavy*, 279 F.3d at 225.

Ambiguous statements in committee reports and definitions of "persons" in unrelated statutory provisions do not constitute clear statements of intent to apply the FCA's punitive damages upon local governments. Thus, the presumption against imposing punitive damages on taxpayers must logically be applied to exempt local governments from liability under the FCA. The Third and Fifth Circuits have interpreted the Court's precedent in precisely this manner. *See Dunleavy*, 279 F.3d 219; *Garibaldi*, 244 F.3d 486. Many district courts have agreed. *See United States ex rel. Kinney v. Hennepin County Med. Ctr.*, 2001 U.S. Dist. LEXIS 10170 (D. Minn. Jan. 22, 2001); *United States ex rel. Honeywell v. San Francisco Housing Auth., et al.*, 2001 U.S. Dist. LEXIS 9743 (N.D. Cal. Jul. 12, 2001); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp.2d 1092 (C.D. Cal. 2001); *United States ex rel. King v. Jackson County Hosp. Corp. of Mariana, Fl.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001).[4]

In stark contrast to the many courts that have considered this issue, the Seventh Circuit erroneously disregards this Court's precedent in *City of Newport* and *Stevens*, to arrive

[4] Other district courts have disagreed, thereby causing a split at the district court level. *See United States ex rel. Rosales v. San Francisco Hsg. Auth.*, 173 F. Supp. 2d 987 (N.D. Cal. 2001); *United States ex. rel. Giles v. Sardie*, 191 F.Supp.2d 1117 (C.D. Cal. 2000); *United States ex rel. R&R Ltd. P'ship v. Mass. Hsg. Fin. Agency*, 154 F. Supp. 2d 19 (D.D.C. 2001).

at the conclusion that a local public hospital is not immune from the FCA and its punitive damages. *Chandler*, 277 F.3d 969.

In light of the foregoing, *amici* respectfully request that this Court reverse the decision of the Seventh Circuit because the FCA and its legislative history provide no basis upon which to allow the imposition of punitive damages on local governmental entities under the FCA.

II. Local Governments Are Immune From the FCA Because the Imposition of Punitive Damages Would Harm the Public at Large and More Particularly Vulnerable Patient Populations and Taxpayers

A. Public Policy Considerations Preclude the Imposition of the FCA's Punitive Damages Upon Local Governments

As there is no evidence of clear congressional intent to eviscerate local governmental immunity from the FCA's punitive damages, the only issue left to consider is whether the application of this immunity is consistent with the purpose of the FCA and public policy considerations.

Policy concerns provide no justification for imposing punitive damages on local governmental entities under the FCA. In fact, policy concerns mitigate against such liability. Punitive damages have two major purposes – punishment and deterrence. Neither of these purposes are fulfilled with the application of punitive damages under the FCA.

Historically, courts viewed punitive damages against local governmental entities as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised. *City of Newport*, 453 U.S. at 263. In explaining the common law tradition of protecting local governments from liability for punitive damages, the Court states:

> Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those [punitive damages] which the plaintiff has recovered . . . cannot, in our opinion, be sanctioned by this court, *as they are to be borne by widows, orphans, aged men and women and strangers,* who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, canno. be bound beyond that amount, which will be sufficient for her indemnification.

Id. at 677 (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)) (emphasis added).

This Court has also determined that punitive damages do not compensate the injured party, but instead are intended to punish the wrongdoer and deter similar actions in the future. *Id.* at 266-67. Indeed, the cost associated with such punitive damages "may be very real," "imposing strain on local treasuries and therefore on services available to the public at large." *Id.* at 270-71. "Neither reason nor justice" supports imposing such punishment on blameless or unknowing taxpayers of a local government, who would bear the burden of punitive damages through reduced services or higher taxes. *Id.* at 267. Thus, subjecting local governmental entities to punitive damages does not advance the purpose of the damages award because those who will pay the damages are not those that should be punished.

The *Garibaldi* court addresses how the imposition of punitive damages contradicts public policy considerations.

> Imposing punitive damages on a local government in favor of the federal government is especially problematic. Requiring such a transfer payment would reflect a judgment by Congress that denying school children of Orleans Parish needed services, or requiring the taxpayers…to pay higher taxes, is justified in the light of the relatively minor benefit to the federal treasury."

Garibaldi, 244 F.3d at 492.

In contrast, the Seventh Circuit's contrary conclusion defies reason.

> Presumably any ill-gotten gains from the federal government produce more services or lower taxes. Thus, even though some of the burden of the FCA's treble damages shifts to the local taxpayers, this shift is not unjust, because the local taxpayers have already received, without justification, some of the benefit.

Chandler, 277 F.3d at 978. The court's faulty logic undermines its own argument. Any "unjust" benefit that local taxpayers have arguably received is the amount of the claim paid to which the public entity was not entitled. The unjust benefit is thereby fully returned when the federal government is compensated for its losses. In contrast, the FCA's treble damages and penalties are purely punitive – they do not represent "ill-gotten gains" from which local citizens have benefited.

Any minimal deterrent effect from the imposition of FCA punitive damages upon local governments will be severely outweighed by public harm. Because it is not the taxpayers or patients who have committed the wrong, subjecting them to punitive damages will not deter future

wrongful action. *See City of Newport*, 453 U.S. at 268 ("it is far from clear that municipal officials . . . would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality").

Finally, there is no reason why a presumption of municipal immunity would undermine the purpose of the FCA. *See Garibaldi*, 244 F.3d at 494-45. (citations omitted) ("even if one assumes that states commit a good deal of fraud against the federal government, it cannot be seriously argued that the very purpose of the [False Claims] Act would be thwarted if states were not liable under the Act. . . . This conclusion is as applicable to local governments as it is to states"). In fact, placing extra burdens on taxpayers is directly contrary to the FCA's goals of reducing taxpayer burdens by preventing fraud on the government.

Moreover, because the FCA *mandates* treble damages, it is by its construction, an inappropriate punishment of local governments, resulting in detrimental harm to the public. In contrast, when the application of punitive damages is *discretionary*, the court or fact finder may look to common law principles to weigh such factors and determine whether punitive damages are indeed appropriate. Such factors may include: 1) whether the award was excessive or inadequate, 2) the degree of reprehensibility of the defendant's conduct, 3) the financial position of the defendant, and 4) the cost of litigation. *See Pacific Mutual Life Insur. Co. v. Haslip, et al.*, 499 U.S. 1, 21 (1991). This process allows for the necessary balancing of the benefit to the plaintiff and the need for deterrence against the cost imposed upon the blameless, which in the case of local public hospitals, are the taxpayers, vulnerable patient populations and communities at large. The FCA provides no such opportunity to consider the equities of each case in awarding punitive damages. This absence of alternatives provides more reason why, absent clear congressional intent,

immunity should be applied to local governmental entities under the FCA.

Therefore, public policy considerations preclude the application of the FCA to local governmental entities. As the FCA allows for the use of alternative mechanisms to ensure that local governments comply with federal law, such punishment is not required to make the government whole. *See* 31 U.S.C. § 3930(D)(5). Given these potential alternatives, the FCA's punitive damages regime should not be applied to these entities because such an award threatens to severely punish the innocent in order to benefit of a single relator.

B. Imposition of Punitive Damages Upon Local Public Hospitals Will Truly Punish Vulnerable Patient Populations and Taxpayers

Public policy considerations are particularly persuasive in the context of local public hospitals providing health services to entire communities, including their underserved populations. Harm to members of communities served by local public hospitals will be certain and widespread should those hospitals continue to face FCA litigation and punitive damages. Because local public hospitals simply do not have disposable resources to pay for such additional costs, FCA liability will inevitably result in a reduction in services.

For years, local public hospitals have teetered on the brink of financial viability. Now for the first time in five years, the average local public hospital margin has plummeted into negative digits. In its most recent annual survey of member hospitals, NAPH reports that almost 50 percent of its members experienced negative margins in 2000, as compared to less than 33 percent in 1996. *America's Safety Net* at 1. In other words, these public hospitals' expenses exceed all of their revenue sources. In 2000, on average, NAPH members had a negative margin of one percent, down from an average positive margin of 2.6

percent in 1996. *Id.* In contrast, according to the American Hospital Association, the average margin for hospitals in the industry was 4.6 percent in 2000. *Id.* Many factors account for these losses, including significant reductions in Medicare and Medicaid payments, a rise in the number of uninsured, personnel shortages and the rising cost of pharmaceuticals. *Id.* at 2.

Thus, when faced with the imposition of treble damages and penalties, local public hospitals have no disposable resources to cover these costs. They must either turn to local taxpayers for additional funding or free up current funds by reducing services. In either case, the burden of FCA liability will be borne by the innocent – taxpayers and/or patient populations.

The mission of local public hospitals is to provide access to vital health care services to all regardless of ability to pay. Such guaranteed access is particularly important in this time of a nation-wide rise in the number of uninsured. *Id.* at 11. In the face of reduced reimbursement from private and government sources, private providers are less willing or able to serve the uninsured. Local public hospitals therefore are assuming an increasingly greater share of this burden. *Id.* This trend is evident in the high percentage of inpatient discharges and outpatient visits by the uninsured in 2000 – on average 27 and 43 percent for NAPH members respectively. *Id.* at 21, 23.[5] Local public hospitals are thus an irreplaceable component of the health care system in this country because they serve those with nowhere else to turn.

---

[5] For example, 27 percent of inpatient discharges and 28 percent of outpatient visits were of uninsured individuals at Contra Costa Regional Medical Center; 32 and 55 percent at the Grady Health System; 49 and 58 percent at Jackson Memorial Hospital; 27 and 46 percent at the Health and Hospital Corporation of Marion County; 34 and 58 percent at Parkland Health and Hospital System; and 46 and 47 percent at Riverside County Regional Medical Center. *Id.* at 20-23.

Serving the poor and uninsured is not the only crucial role filled by local public hospitals in their communities. Local public hospitals are also often the primary providers of highly-specialized and extremely expensive services, upon which entire communities rely, such as emergency and trauma care, burn care, pediatric and neonatal intensive care, HIV/AIDS treatment, and psychiatric care. For example, in 2000, NAPH members represented only 16 percent of all hospital beds in the areas they serve, but provided 52 percent of all burn care beds; 26 percent of all pediatric intensive care unit beds; 25 percent of all neonatal intensive care beds; 40 percent of all Level I trauma centers; and handled 22 percent of the emergency department volume. *Id.* at 6. These services are not readily available at all hospitals because they are so costly to provide and because they are often severely underreimbursed. In accordance with the public hospital mission, providing such services is a "public good," which is funded in part through local taxpayer support because the market itself does not always ensure adequate access.

Local public hospitals also typically serve as the backbone of community disaster preparedness efforts, which have become particularly important in recent months due to increased concern about threats of biological, chemical or nuclear terrorism. These hospitals are often the only facilities in their communities with the capacity to prepare for and respond to mass casualty attacks. *See, e.g.,* Nat'l Ass'n of Pub. Hosp. & Health Sys., *What Are the Basic Components of a Sound Hospital Emergency Preparedness Program?* (2000). Such emergency preparedness requires training, stockpiling supplies and drugs, purchasing specialized equipment and coordinating with local, state and national public health officials. Local public hospitals also must be ready to respond to other types of public health emergencies, such as natural disasters, urban riots and airplane and train accidents. *Id.* Local communities and

indeed the nation as a whole have come to rely on local public hospitals to assume these critical responsibilities. Yet these entities do so with very little financial support.

Finally, local public hospitals provide other types of services to an extent not typically provided by private hospitals. These services are critical to enable vulnerable populations to access our health care system. For example, local public hospitals provide intensive translation and interpretation services for patients with limited or no English proficiency. NAPH member Hennepin County Medical Center, for example, meets the needs of its immigrant patients by employing more than 50 interpreters proficient in 20 different languages. *See* Nat'l Ass'n of Pub. Hosp. & Health Sys., *The Safety Net*, Vol. 15, n.2, 1, 26 (Spring 2002). Other such "enabling services" include child care, social services, transportation and financial counseling. There is typically no direct reimbursement for these essential services.

Given the manner in which they serve their communities, local public hospitals are operating under significant financial constraints. Uncompensated care accounted for 24 percent of total costs for NAPH hospitals as a whole, or approximately $4.8 billion in 2000. In comparison, uncompensated care costs were at six percent across the entire hospital industry. *America's Safety Net* at vi, 25.[6]

---

[6] This is evidenced by the levels of uncompensated care costs borne by *amici*. In 2000, Contra Costa Regional Medical Center had $47 million (24 percent of its total costs); Grady Health System had $222 million (44 percent of its total costs); Jackson Memorial Hospital had $239 million (30% of its total costs); the Health and Hospital Corporation of Marion County had $100 million (37 percent of its total costs); Parkland Health and Hospital System had $230 million (40 percent of its total costs); Riverside County Regional Medical Center had $55 million (31 percent of its total costs). *Id.* at 24-25.

The foregoing strongly illustrates why public policy considerations preclude the application of punitive damages to local public hospitals under the FCA. Where the margins of these public hospitals may be negative, with no capacity to absorb significant new costs, the imposition of punitive damages will jeopardize the health of local communities – possibly on a massive scale. Such a potential result, combined with the absence of any clear congressional intent to rebut the presumption of municipal immunity, requires a conclusion that the FCA punitive damage regime may not be imposed upon local public hospitals.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Charles Luband, *Counsel of Record*
Larry S. Gage
Hemi D. Tewarson
Powell, Goldstein, Frazer & Murphy LLP
1001 Pennsylvania Ave., N.W.
Suite 600
Washington, D.C. 20004
(202) 347-0066

Attorneys for Amici Curiae